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IMPROVEMENTS IN FEDERAL SENTENCING PROCEDURES

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A new, and as yet unappreciated, step in modernizing and improving federal criminal sentencing procedures has been taken by the enactment, by the 85th Congress, of a law which permits federal judges to impose what, in effect, is an indeterminate sentence.[1] This law, approved August 25, 1958, among other things, permits the court at the time of sentencing, to specify an eligibility date for earlier parole consideration than at present, or, by delegating the determination of that date to the Parole Board, to prescribe an indeterminate sentence. While the indeterminate sentencing principle has long been a part of the laws of some 38 of the states,[2] this is the first time legislation has authorized the use of it in the federal system. In the some 8 months since the law has been effective, it appears from limited statistics and information available, that relatively few federal judges have employed this new grant of authority with its attendant great advantages in advancing the administration of even-handed justice and at the same time of relieving the judge of what, to most of us, is the heaviest and most awesome burden of our judicial life.

One of the most pressing problems in the administration of criminal justice on the federal level concerns itself with marked disparity of sentences imposed for the same crime upon criminals with substantially the same previous records and backgrounds by judges not only in separated sections of the country, but in contiguous districts and even by judges within the same district. This situation has been the subject of much discussion by the Attorney General, judges, lawyers, penologists, prison officials, social workers and others interested in the subject.[3] Recently the Senate Judiciary Committee concerned itself with this and similar problems in the field of federal law enforcement and the administration of justice.[4] The disparity of sentences imposed in the United States courts reflects an inadaquacy in our sentencing policies and pro-

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1. P. L. 85-752; 72 Stat. 845, 18 U.S.C.A. § 4208(a) (Supp. 1958).

2. Illinois Legislative Council Report, *Indeterminate Sentence and Parole Laws*, Oct. 1950, p. 2; Tappan, *Sentencing Under The Model Penal Code*, 23 Law & Contemp. Prob. 528, 532 (1958).

3. For an extensive bibliography of articles on sentencing, see, Staff of House Comm. on Judiciary, 85th. Cong., 2d Sess., *Report on Federal Sentencing Procedures*, p. 162 (1958).

4. See, Senate Comm. on the Judiciary, Sen. Rep. No. 1478, 85th Cong., 2d Sess., *Report on Improving Federal Law Enforcement and Administration of Justice*, (1958).

cedures which furnishes a challenge for change. A few statistics from many available will serve to illustrate the point.

In his annual report, the Director of the Bureau of Prisons recently pointed out that in the year ending June 30, 1957, the federal prisons received 43 prisoners from the Eastern Arkansas district convicted of driving a stolen motor vehicle who had received an average sentence of 3 years, and from the adjoining district of Northern Mississippi about the same number were received, for the same offense, with an average sentence of only 15 months. This is a disparity of more than 2 to 1. A 4 to 1 difference is reflected in the fact that the sentences for liquor law violations in the Western Tennessee district averaged 4 months, while in Eastern Tennessee it was 16 months. For forgery the average sentence was 16 months in Eastern North Carolina and 31 months in Middle North Carolina.[5]

During 1957 average federal sentences of imprisonment for all types of crime varied from 8.9 months in New Hampshire to 54.6 months in Western Oklahoma. A postal law violator and drug addict, who also admitted a heavy use of alcohol and marijuana, received a 6-month sentence while another postal law violator whose crime and background were much less serious received a 3-year sentence. In two similar cases of check forgery, one defendant received a 3-year sentence, while the other received a 24-year sentence. The proportion of convicted offenders placed on probation for all types of crimes varied widely ranging, in 1957, from 15.3 percent in Western Texas to 68.8 percent in Vermont.[6] In our own Eighth Circuit, during 1958, it varied from 12 percent in Southern Iowa to 68 percent in South Dakota.[7]

Statistics gathered for the fiscal year 1955 indicate that there is marked discrepancy in sentences imposed not only in the different districts but as between different judges in the same district. Thus, by way of example, in the Northern District of California, the statistics for the stated period reflect that Judge Murphy imposed an average sentence of 17.2 months and Judge Halbert gave an average sentence of 48.5 months for illegal auto transportation, and in the Northern District of Illinois for the same offense, Judge Campbell imposed an average sentence of 8.9 months and Judge Knoch imposed an average sentence of 27 months.[8] These dispari-

5. 1957 Federal Prisons 2 (U.S. Dept. Justice).
6. Sen. Rep. No. 2013, 85th Cong., 2d Sess. (1958), 2 U.S. Code Cong. & Ad. News 3893 (1958).
7. 1958 Federal Prisons 98, Table 22 (U.S. Dept. Justice).
8. Sen. Rep., *supra* note 4, at 25.

ties, more examples of which are contained in the cited sources and elsewhere, involve a fundamental question of the administration of criminal justice, create serious problems in the custodial care of prisoners, and work a moral wrong upon the persons involved.

It is easy to explain that each federal judge is a human being, possessed of his own independent judgment formulated on the basis of his background and experience, and that this accounts for the difference in their attitude toward the severity of punishment which should be imposed. But it is quite another thing to justify the continuance of such disparity. Some of the sentences imposed are too long and some are too short. Some prisoners are released too soon and some are retained too long. The prisoner who is released too soon, and thus denied the opportunity of complete rehabilitation, becomes again a menace to society and he whose imprisonment is prolonged is molded into a hardened and embittered person whose future rehabilitation is made impossible. Wide discrepancies in sentences imposed discourage much needed respect for the law and prompt a challenge to our highly-touted "equality under the law."

The enactment in 1958 of the new federal law permitting, in effect, the imposition of an indeterminate sentence and making other improvements in sentencing procedures, was antedated by the introduction of a resolution[9] by Chairman Celler of the House Judiciary Committee, which cited the lack of agreement among federal courts as to ". . . the objectives, standards, and policies to be followed in sentencing of federal offenders which results in wide disparity of prison terms, fines and the use of probation" and the introduction of bills which, when enacted in principle by the 85th Congress, provided for three major improvements in federal sentencing policies which should greatly minimize the present disparity of sentences.[10]

The first of these, now found in 28 U.S.C.A. § 334 (Supp. 1958), provides for a series of joint meetings or institutes to be attended by judges and other government officials to seek out more uniform standards in sentencing. These conferences are to be held under the jurisdiction of the Judicial Conference of the United States. It is contemplated that such conferences are to be conducted in each circuit under the aegis of the Chief Judge, to be attended by

9. H. R. J. Res. 424, 85th Cong., 2d Sess. (1958).
10. P.L. 85-752; 72 Stat. 845, 28 U.S.C.A. § 334; 18 U.S.C.A. § 4208, 4209 (Supp. 1958).

the district judges, United States attorneys and other interested Department of Justice and federal officials. While the enactment of this provision may be viewed as very general and discretionary in nature, its implementation by interested support from the Chief Judges of the circuits will give district judges and other interested officials an opportunity to exchange helpful information in the formation of consistent and objective policies and criteria for sentencing those convicted of crimes. We judges need to develop, not uniformity, but some kind of consensus in sentencing philosophy. This will afford us the opportunity to do so. I am advised that something in the nature of a pilot conference of this kind is being held in the Tenth Circuit in July of this year under the leadership of Circuit Judge Alfred P. Murrah. It is hoped that similar conferences will be conducted in all the circuits.

A second part of the new law, now found in 18 U.S.C.A. § 4209 (Supp. 1958), raises the age limit of eligibility for commitment under the Federal Youth Correction Act[11] from those under-22 years to those under-26 years. Prior to 1957, the provisions of the Youth Correction Act were only available to judges east of the Mississippi River because of inadequate facilities elsewhere, but since 1957 all federal judges have been able to employ the beneficial provisions of this law with its indeterminate sentence provisions. There has been an ever-increasing use of this Act and raising the age limit to include those of age 25 is expected to appreciably enlarge the number of those committed under it.[12] This is a wise and desirable enlargement of the scope and applicability of the humane and forward-looking provisions of the Youth Correction Act.

The third and most important change made in the law is in that portion of 18 U.S.C.A. § 4208(a) (Supp. 1958) which permits the sentencing court, when the ends of justice and the best interests of the public require, to designate in the sentence of imprisonment a minimum term at the expiration of which the prisoner shall become eligible for parole. That minimum term may be less, but not more, than the present statutory 1/3 of the maximum sentence imposed by the court.[13] In the alternative, the court may fix the maximum sentence of imprisonment to be served and specify that the prisoner

11. 18 U.S.C.A. 5005-5026 (1952), as amended by Act of Aug. 25, 1958, 72 Stat. 846 extending the age limit to 26 years.

12. Prison Director James V. Bennett advised me that between Aug. 25, 1958 and April 1, 1959, a total of 132 youths between the ages of 22 and 26 were committed under the Act from 48 different districts.

13. 18 U.S.C.A. § 4202 (1952).

may become eligible for parole at such time as the Board of Parole may determine.

This is the heart of the change made by the law and, in effect, provides that the court may, but is not required to, delegate to the Board of Parole the fixing of the time of the prisoner's release.[14]

While the above-discussed provisions providing for the creation of joint councils to study sentencing procedures, and raising the eligibility age for commitment under the Youth Correction Act are undoubtedly meritorious steps in removing or minimizing the disparity of sentences now imposed in the federal courts, it is thought that the enactment of what is now 18 U.S.C.A. § 4208(a)(2) authorizing the court to impose an indeterminate sentence by vesting in the Parole Board the authority to determine the prisoner's time of eligibility for parole, is the most important result of the efforts of the 85th Congress to improve federal sentencing procedures.

This new law permits a judge to share his responsibility for sentencing with a competent agency of the Executive Department which, on the basis of the prisoner's background and record, his progress in rehabilitation in the prison and his attitudes toward a return to society, is able to wisely determine the length of sentence to be served which will be best adapted to his individual case. It is difficult, if not impossible, for a judge at the time of sentencing to determine in advance the time at which the defendant will have received the maximum benefits of imprisonment. The old method of fixing a definite sentence in terms of years, even where a prisoner was eligible for parole after having served the arbitrary ⅓ of the time fixed, made no allowance for the fact that the term of each prisoner should be determined on the basis of his individual capacity for rehabilitation. Aristotle said: "There can be no greater injustice than to treat unequal things equally." No judge, regardless of his qualifications or ability, has the insight to foretell at the time of sentencing when the prisoner should best be released for his own benefit and that of society.

While the employment of the authority granted by this new law has its chief merit in reducing the disparity in sentences, it has a secondary benefit which should be of great mental relief to the

14. There is also a provision in this section of the law which permits the court to temporarily commit the prisoner to the custody of the Attorney General and, in the meantime, secure a study from the Director of the Bureau of Prisons, as a basis for determining what sentence to impose. After receipt of such report and within 6 months the judge may then sentence the prisoner as his judgment dictates. This is a useful method of handling a limited type of case, such as those suspected of mental illness. 18 U.S.C.A. § 4208(b) (Supp. 1958).

sentencing judge, and that is that it releases him from the burdensome responsibility of alone determining and imposing sentence and then living for a while with a residual apprehension as to the correctness of his judgment in a particular case. It is now possible for a judge, by the use of this new device, to assure himself that, by inviting the experienced judgment of the Parole Board to aid him by determining the terminus of imprisonment, he has imposed the best and most humane sentence possible.

The enactment of this authority is of particular value now because of the recent tendency on the part of federal judges as a group to impose much longer sentences than formerly. Since 1949 the average sentence of prisoners received in federal institutions has increased by nearly 40%.[15] This seems to be an inordinately large increase, even taking into consideration the increase in the incidence and seriousness of crime. It is suggested that the long sentence does not take into consideration the basic correctional concept that an offender, any offender, should at least be given the chance to promptly resume his place in society upon a reasonable showing that he is able to do so, and the long sentence, with its emphasis on deterrence, militates against this meritorious rehabilitative principle.

A salient feature of the new law is its specific inapplicability to an offense for which a mandatory penalty is provided.[16] The primary application of this exception is to the sentences provided for marijuana and narcotics offenses. In late years, the Congress has legislated in this field by the enactment of requirements for mandatory long sentences as to which there is no eligibility for parole or probation. In 1951 the Congress passed the Boggs Act,[17] and more recently the Narcotics Control Act of 1956.[18] The Boggs law established the first mandatory minimum terms for illicit sellers and possessors of narcotics and marijuana, and prohibited probation for second offenders. The Narcotics Control Act of 1956 provided mandatory terms of not less than 10 years for second offenders in connection with a number of narcotic and marijuana offenses, and minimum terms of not less than 10 years for first offenders in cases involving illicit drug sales to minors. The law also made persons convicted under these provisions of the law ineligible for probation or parole.

15. 1957 Federal Prisons 3, (U.S. Dept. Justice).
16. § 7.
17. P. L. 255, 82nd Cong. 2d Sess; 65 Stat. 767, 21 U.S.C.A. § 174 (1951).
18. P. L. 728, 84th Cong. 2d Sess., Act of July 18, 1956, c. 629, 70 Stat. 567, (codified in scattered sections of 8, 18, 21, 26 U.S.C.A.).

While there was much need for the enactment of sterner measures dealing with illegal traffic in narcotics and marijuana, especially as it concerns the youth, it is doubtful if the requirement for mandatory sentences and the provisions dealing with ineligibility for parole and probation are wise. It is suggested that it is seldom prudent for a legislative body to bind prosecutors and judicial officers with enforcing and imposing mandatory sanctions, although it may well be meritorious to provide for discretionary long sentences.

The judge may well feel that in a particular case a violator is deserving of a long prison sentence,[19] but it seems illogical and inhuman to arbitrarily say that even one who has committed such a heinous offense should be imprisoned for a legislatively fixed long term to protect society or that he is beyond even the possibility of rehabilitation. The judge who is required to pass sentence under a strict mandatory statute must act like on automaton, devoid of the discretion which should be the hallmark of his every action. It is claimed that the statistics indicate that the mandatory sentence features of the narcotic laws and the prohibition against probation and parole have caused a lessening of such crimes.[20] It is doubtful, however, if mandatory sentences and prohibitions against the use of probation and parole with its consequent deprivation of authority in courts and Parole Boards to suit the length of imprisonment to the individual case, is conducive to the overall proper, humane or effective administration of justice. Montesquieu once observed, "As freedom advances, the severity of the penal law decreases." I am fearful that while our federal system is making forward progress with the adoption of the indeterminate sentencing idea, it is retrogressing when it provides nondiscretionary punishment machinery.

There is divided opinion among judges, state and federal, as to the wisdom of indeterminate sentence laws and to variations of that principle.[21] But when one examines the arguments in opposition to it, it is difficult to find therein much logical support.

It is many times said that the sentencing of a criminal is solely a judicial function. Some judges resent the thought that lay persons, even those trained in penology and sociology, should share

19. Recently the writer sentenced one Felix Williams to 35 years, and more recently Eddie White and Willard Barrett each to 15 years, under the 1956 law, but all of them were confirmed dope peddlers with bad records.

20. H. R. Rep. No. 2388, 84th Cong. 2d Sess. 2(1956); 2 U. S. Code Cong. & Ad. News 3281 (1956).

21. See, e. g., Goodman, *In Defense of Federal Judicial Sentencing*, 46 Calif. L. Rev. 497 (1958).

the responsibility of determining the length of sentence. The plain truth of the matter is, however, that while the actual sentencing of a criminal is properly the judge's job, it cannot logically be said that determining the exact length of that sentence cannot be done better in most cases by trained parole officers who, after sentencing, and in the light of the prisoner's rapidity of rehabilitation, are able to determine a proper and logical time to release him. The foresight of the judge is not as good as the hindsight of the Parole Board members.

It is also sometimes said that since federal judges are appointed, in effect, for life, they are immune from pressure and able to withstand importuning by relatives and friends in the sentencing function. But can it not be said of parole officers that they, too, are accustomed to resisting pressure and to evaluating the pros and cons of arguments made for the release of one committed. I believe it to be indispensable to the fair and effective functioning of any kind of an indeterminate sentence law that the Parole Board or other releasing authority consist of members and staff of the highest competence and ability. Although I have no reason to believe that the present Parole Board members are not persons of high qualifications, it is of great importance that the appointing authority choose only persons of marked ability and high motives to insure the success of their work and the reposing of confidence in them by the public and the courts.

It is also occasionally urged that Parole Boards are too soft, and hence that we cannot vest in them the responsibility of determining a proper release date. But, at the same time, there are those who say that Parole Boards are too strict. We should remember that it is also said that some judges are too strict or too lenient. The execution of any governmental responsibility by any human in the judicial or executive branch of the government, is open to the same or similar charges.

Meritorious and needful as the new law may be, informal surveys among judges and inquiry from wardens of some of the federal penal institutions indicate that, to date, only a small percentage of the federal judges have used this law. The Director of the Bureau of Prisons advised me that as of April of this year, the indeterminate sentence procedure had been used only 72 times. In the seven months following its enactment, the writer has used the law in every case except those where mandatory sentences were required under the narcotics laws or where sentences imposed were

a year or less. It has been my practice to impose sentence for a substantial period, often the maximum set out in the statute, and then append to the sentence, the proviso that the defendant shall be "eligible for parole at such time as the Board of Parole may determine," quoting from the statute.[22] The writer has used this authority in every kind of case, including white slave, bankruptcy fraud, mail theft, interstate transportation of stolen cars, interstate transportation of forged securities, narcotics cases where the mandatory provisions are not applicable and even selective service violations.

It is not to be implied that it is wise to habitually vest blanket discretion as to the length of sentence in the Parole Board. In those cases where the court wishes to insure the service of a minimum term in order, for instance, to effect punishment or to provide example, the alternative authority of Section 4208(a)(1) should be used by fixing a minimum date of eligibility for parole.

While this discussion has dealt principally with the law as affording the machinery to adjust the length of sentences to the individual case, I have found that its greatest merit, to me personally, lies in the relief I feel from the possibility of having imposed an improper sentence without a residual authority to later correct it. I am sure that every judge will confess to himself that some sentences he has imposed have been too long and some of them have been too short. No judge is possessed of the God-like prescience to determine in advance the exact time that a criminal should be released from custody.

I would urge my fellow judges to read the interesting and enlightening Congressional report which accompanied this law's enactment,[23] to give attention to the literally inexhaustible volume of legal discussions and other papers on this subject and, at each sentencing, to consider whether the authority granted should be exercised. I feel quite satisfied that if a substantial number of judges use the law, it will develop a body of experience from which it might well be deduced that an enlargement of the indeterminate sentence principle might well be grafted into the federal statutes. There is a substantial body of judicial thinking to the effect that an even more extensive application of the indeterminate sentencing principle should be enacted by the Congress. In replies received from federal judges, to an inquiry from Chairman Celler of the

22. 18 U.S.C.A. § 4208(a)(2) (Supp. 1958).
23. See, Sen. Rep. No. 2013, 85th Cong. 2d Sess., H. R. Rep. No. 1946, 85th Cong. 2d Sess., 2 U.S. Code Cong. & Ad. News 3891 (1958).

House Judiciary Committee as to their attitude on the subsequently enacted proposal,[24] 47.6 percent of those responding endorsed the idea, 23.5 percent of them opposed it, and the remainder urged a modification of it or suggested a different approach. A large percentage of the replies suggesting modification or a different approach, advocated vesting an even greater authority in the Parole Board. Some suggested that the court be vested with the authority to fix the maximum sentence and that the Parole Board determine in every case the minimum term.

There are many other suggestions on the subject. The American Law Institute has given much attention to the problems of sentencing, especially in its advocacy of the Model Penal Code. This Code[25] would grade felonies into three categories, according to their seriousness, with sentences of indeterminate length for each category. The maximum terms would be proscribed by statute, while the minimum terms would be fixed by the court within a limited range established by law. It is urged that in this way the whole matter of determining the length of a sentence is shared by the Congress in fixing the maximum, by the court in fixing the minimum, and by the parole authority in determining the time of release within the maximum and minimum range.

I am satisfied that, while judges should not abdicate their basic authority to impose sentences, they should be quite willing to share with others, some better qualified than they and certainly in a better position to do so on the basis of later-acquired knowledge, the responsibility of determining the exact length of the sentence. The extent to which the indeterminate sentence principle has been inserted into our federal sentencing laws is sufficient, if widely used, to afford every hope that the ugly statistics, reflecting gross disparity of sentences and constituting a blot on the shiny shield of justice, will be appreciably diminished, and, in the light of the experience gained, will afford us direction as to the need for further extension of the principle.

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24. House Comm. on the Judiciary, 85th Cong. 2d Sess., *Report on Federal Sentencing Procedures*, 13 (1958).

25. A good summary of the provisions of the Model Penal Code as it pertains to sentencing is contained in Tappan, *supra*, note 2.